United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 74-2343

IN THE

United States Court of Appeals

For the Second Circuit

GER-RO-MAR, INC., a corporation, d/b/a SYMBRA'ETTE, now known as SYMBRA'ETTE, INC., and CARL G. SIMONSEN, individually and as President of GER-RO-MAR, INC., now known as SYMBRA'ETTE, INC.,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of Order of Federal Trade Commission

PETITIONERS' BRIEF

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PRELIMINARY STATEMENT

This is a petition for review pursuant to 15 U.S.C.A. §45 of an order issued by the Federal Trade Commission against Ger-Ro-Mar, Inc., a corporation, doing business as Symbra'Ette, whose corporate name is now Symbra'-Ette, Inc., and Carl G. Simonsen, individually and as an officer of said corporation. The Opinion of the Commission was written by the Honorable Paul Rand Dixon, Commissioner, and was dated July 23, 1974.

The petitioner, Symbra'Ette, Inc., is a California corporation, having its place of business at Scotts Valley, California. Symbra'Ette, Inc. was organized in the year

1963 and is engaged in the manufacture and sale of brassieres, girdles, swimwear, and lingerie. Its sales have grown from $36,832.91 in 1965 to $2,054,250.62 in 1969 and have fallen in 1972 to $1,195,465.75.

Symbra'Ette, Inc. is a family organization in which the petitioner, Carl G. Simonsen, is the president. His wife, Mabel M. Simonsen, is the treasurer and supervises the accounting department and offices. A son, Gerald D. Simonsen, is active in the business operations of Symbra'-Ette, Inc. A daughter, Marilyn R. Simonsen, is in charge of manufacturing and production. The total number of persons employed by Symbra'Ette is less than 60.

ISSUES PRESENTED FOR REVIEW

1. Is the present proceeding in the public interest as required under Section 5 of the Federal Trade Commission Act (15 U.S.C.A. §45)?

2. Is there substantial evidence of record of probative value to support a finding that Symbra'Ette's marketing plan has the substantial tendency, capacity and potential to mislead?

3. Is there substantial evidence of record of probative value to support a finding that Symbra'Ette's marketing plan is inherently deceptive and injurious as to violate Section 5 of the Federal Trade Commission Act (15 U.S.C.A. §45)?

4. Can a merchandising program as a matter of law be deemed to be inherently deceptive or misleading without any proof of actual injury or damage?

5. Has the Federal Trade Commission duly considered the legal principle that the Federal Trade Commission does not have the unbridled power to single out the petitioner for discriminatory treatment, while permitting its direct competitors to continue to operate under like and similar marketing programs?

6. Do Provisions 1 and 2 bear any relation to the facts of this case and do they go beyond what is reasonably necessary to correct the alleged wrong and to preserve the rights of the public?

PERTINENT STATUTES

35 U.S.C.A. §45—Section 5 of the Federal Trade Commission Act provides, in part, as follows:

> §45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices
>
> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. . . .
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice.

STATEMENT OF THE CASE

On November 24, 1971, a complaint was filed against the petitioners alleging a violation of the provisions of Section 5 of the Federal Trade Commission Act, as amended. The alleged violation appears to be predicated on five counts, which may be summarized as follows:

1. Symbra'Ette's merchandising program is allegedly in the nature of a lottery;

2. Symbra'Ette merchandising program allegedly employs unfair and deceptive practices;

3. Symbra'Ette allegedly made false, misleading and deceptive representations in the conduct of its business;

4. Symbra'Ette allegedly fixed prices at which its Symbra'Ette products were resold;

5. Symbra'Ette allegedly acted in restraint of trade in allegedly restricting the channels of trade; the supply of Symbra'Ette goods to distributors; and restricting the resale of Symbra'Ette goods to distributors, and restricting the resale of Symbra'Ette goods by distributors.

On October 25, 1973, the petitioners were served with an Initial Decision by Administrative Law Judge Daniel H. Hanscom finding the petitioners in violation of the above five counts. A Notice of Intention to Appeal the entire Initial Decision was filed by the petitioners and was received by the Federal Trade Commission on October 29, 1973.

On August 19, 1974, the Federal Trade Commission issued a Final Order and Opinion. The Final Order adopted the following Findings of Fact, Discussion, and

Conclusion of Law of the Administrative Law Judge in the Initial Decision:

Preliminary Statement (pp. 1-3);
Findings of Fact 1-25 and 27-30;
pp. 25-27 *sub nom.* "Discussion";
p. 35 (last two paragraphs);
p. 37 (last paragraph) through p. 44;
Conclusions 1-4.

Additional Findings of Fact and Conclusion of Law of the Commission are contained in the aforementioned opinion.

The Commission reversed the Administrative Law Judge on the lottery count and affirmed the Administrative Law Judge on the counts alleging unfair and deceptive practices; misrepresentations in the sale of products to distributors; vertical price fixing and unlawful customer restrictions.

On September 9, 1974, the petitioners filed a Petition for Reconsideration Under Rule 3.55, Part 3, of the Rules of Practice of the Federal Trade Commission. The Commission issued an Order denying the motion for reconsideration. Thereupon a Petition for Review of Order was filed with this Court.

There is no contention on the part of the Federal Trade Commission that the Symbra'Ette merchandising program employs any deception, fraud, unethical practice, misrepresentations or improper conduct in the sale or presentation of the Symbra'Ette products or their prices to consumers. (I.D. page 25, Paragraph 9 of the

Stipulation of Facts dated March 16, 1973.)[1] The ultimate consumer receives a good product at a fair and competitive price. (Tr. page 138, lines 7-20) Consumer acceptance and satisfaction are the hallmarks of success for the Symbra'Ette program. Exhibits RX-157 through RX-196 are letters received from consumers of Symbra'-Ette products during the year 1973. The contents of these letters support the contention that the Symbra'Ette products are of good quality and are reasonably priced.

Symbra'Ette's Direct Selling Marketing Program

A distributor's gross profit under the Symbra'Ette marketing plan is the difference between the price she pays for Symbra'Ette products and the price at which she sells them. The distributor receives additional profits from the sale of Symbra'Ette products based on sales made by distributors she has sponsored, and an additional profit based on maintaining a minimum volume of sales she has personally made to ultimate customers. (Paragraph 7 of the Stipulation of Facts, dated March 16, 1973)

Symbra'Ette distributors do not pay any finder's fee, franchise fee, transfer fee, distributor fee, release fee, investment fee or the like. Symbra'Ette distributors do not pay for the right to enter into the Symbra'Ette program. On the contrary, the only money paid by Symbra'-

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[1]Abbreviations used in Brief:
I.D.—Initial Decision of Administrative Law Judge;
Tr.—Transcript of Hearings;
CX—Complaint Counsel's Exhibits;
RX—Petitioners' Exhibits.

Ette distributors has been for the purchase of Symbra 'Ette products, goods and merchandise. (Complaint, Count I; Paragraphs 7, 8 and 14 of the Stipulation of Facts dated March 16, 1973; Tr. p. 74, line 1—p. 76, line 22; Tr. p. 138, line 21—p. 140, line 9; Tr. p. 192, lines 18-23; Tr. p. 195, lines 6-17.)

The Symbra'Ette marketing program is primarily a direct selling plan (RX-1). However, sales are made to retail stores and outlets for resale, such as boutique shops, cosmetic shops, beauty shops, lingerie shops and the like (RX-7, RX-13, RX-72 through RX-83).

In Symbra'Ette's direct selling program there are four classifications, namely: consultant, senior consultant, district director and regional director. One enters the program only as a consultant and is afforded the opportunity of working one's way upwardly to a senior consultant, a district manager and a region director in the order mentioned. Elevation to one of the higher levels is made when a prescribed purchase volume is reached in a given month and such higher level is retained so long as a prescribed purchase volume is maintained for a calendar quarter. (Paragraph 7 of the Stipulation of Facts, dated March 16, 1973 and RX-1.)

One becomes a consultant by purchasing Symbra'Ette products. The initial order is a sample kit sold for $89.95, which is refundable in full within 90 days at the sole election of the purchaser.[2] (Paragraph 7 of the Stipulation of Facts, dated March 16, 1973, and RX-3.) The number of active consultants is limited to 1/10 of

[2]Later changed to $159.40 and refundable in full in 30 days.

1% of the population of each state taken respectively (RX-2).

A distributor's gross profit is the difference between the price he pays for Symbra'Ette products and the price at which he sells them, with additional profit incentives. All distributors purchase their needs directly from Symbra'Ette at 35% off the suggested retail list price. Each distributor who has personal purchases of $500 purchase volume (suggested retail price totals) in any one month receives an additional profit equal to 5% of his personal purchase volume for such month.

In addition, the distributors receive the following:

a. Consultant—A Consultant purchases at the basic discount of 35%. If his personal purchase volume for any month reaches $150, he receives an additional profit of 3% on purchases made by directly sponsored Consultants. A Consultant receives a $15 additional profit for each month that his personal purchase volume reaches $750. There are no other monies required beyond what has been listed above in this paragraph. There are no other profits accruing to said distributors other than those listed herein above.

b. Senior Consultant—A Senior Consultant purchases at the basic discount of 35%. He receives an additional profit of 5% on his personal purchases and 5% on his directly and indirectly sponsored Consultants' purchases. If his purchase volume for any month reaches $750 (provided his personal purchases reach $150), he receives 2% on the purchase volume of his directly sponsored Senior Consultants. A Senior Consultant receives an additional profit of $30 if his personal purchase

volume and his Consultants' purchase volume reach $1,500 ($150 of which must be the personal purchases of the Senior Consultant). His purchase volume for any calendar quarter must reach $1,500 (to include $450 personal purchases) to maintain his Senior Consultant level. There are no other monies required beyond what has been listed above in this paragraph. There are no other profits accruing to said distributors other than those listed herein above.

c. District Director—A District Director purchases at the Basic Discount of 35%. He receives an additional profit of 10% on personal purchases, 10% on directly and indirectly sponsored Consultants' purchases, and 5% on directly and indirectly sponsored Senior Consultants' purchases. If his personal purchase volume for any month reaches $150 and during that month his purchase volume, his Senior Consultants' purchase volume and Consultants' purchase volume reach $2,500, he receives an additional profit of 2% on the purchase volume of that month of the directly sponsored District Directors' purchase volume and 1% on the purchase volume that month of indirectly sponsored District Directors. A District Director receives a $100 additional profit for each month that his personal purchases reach $150 and the total purchase volume of the District Director, his Senior Consultants and Consultants reaches $4,500. A District Director's personal purchase volume must reach $450 for any calendar quarter and his Senior Consultants' purchase volume and Consultants' purchase volume must reach $6,000 to maintain his District Director level. There are no other monies required beyond what

has been listed above in this paragraph. There are no other profits accruing to said distributors other than those listed herein above.

d. Regional Director—A Regional Director purchases at the Basic Discount of 35%. He receives an additional profit of 15% on personal purchases, 15% on directly and indirectly sponsored Consultants' purchases, 10% on directly and indirectly sponsored Senior Consultants' purchases, and 5% on directly and indirectly sponsored District Directors' purchases. If his purchase volume for any month (purchase volume to include purchase volumes of his Senior Consultants, Consultants and directly and indirectly sponsored District Directors) reaches $12,500, he receives 2% on purchase volume of directly sponsored Regional Directors. A Regional Director receives $200 additional profit for each month that his purchase volume reaches $17,500. A Regional Director is to reach $30,000 from his District Directors' purchase volume, his Senior Consultants' purchase volume and his Consultants' purchase volume in one calendar quarter to maintain his Regional Director level. There are no other monies required beyond what has been listed above in this paragraph. There are no other profits accruing to said distributors other than those listed above. (Paragraph 7 of the Stipulation of Facts, dated March 16, 1973.)

Symbra'Ette's Direct Selling Program at the Time of the Filing of the Complaint

The Symbra'Ette direct selling marketing program was a distribution network which allowed a potential distributor to enter at any one of three levels, i.e. "Key

Distributor", "Senior Key" or "Supervisor", and eventually qualify at a fourth and fifth level, that of District Manager and Regional Manager. One entered into the Symbra'Ette distribution system by purchasing merchandise from Symbra'Ette or its distributors. All distributors, except for the Key Distributors (hereinafter sometimes referred to as Keys), bought directly from Symbra'Ette. A distributor's gross profit was the difference between the price at which he bought and sold the merchandise, plus additional profits on the purchase volume of those Consultants directly sponsored by the Distributor.

a. Key Distributor—Key Distributors purchased their products for resale at 35% off the retail list price, known by Symbra'Ette as the retail purchase volume (or R.P.V.). There were no other monies required beyond what has been listed above in this paragraph. There were no other profits accruing to said distributors other than those listed herein above.

b. Senior Key—Senior Keys purchased their needs directly from Symbra'Ette at 40% off the retail list price for sale to Keys or the general public. A Senior Key received a 5% additional profit on purchases made by his directly recruited Key Distributors and a 1% additional profit on purchases made by his directly recruited Senior Keys' groups. A person became a Senior Key either by purchasing an initial inventory of $1,000 in terms of retail list prices or by starting out as a Key Distributor and, with his personal group, reaching a monthly retail purchase volume of $1,000. There were no other monies required beyond what has

been listed above in this paragraph. There were no other profits accruing to said distributors other than those listed herein above.

c. Supervisor—Supervisors purchased their products for resale at 45% off the retail list price, and purchased from Symbra'Ette. A Supervisor's organization or personal group included his directly sponsored Senior Keys' entire groups and his directly sponsored Key Distributors' entire groups.

A distributor who had one directly recruited Senior Key and two directly recruited Key Distributors became a Supervisor either by purchasing an inventory of $3,000 in terms of retail list prices or, with his personal group, reaching a monthly retail purchase volume of $3,000. A Supervisor earned a 5% additional profit on purchases made by his Senior Keys and a 10% additional profit on purchases made by his Key Distributors. He also received a 2% additional profit on purchases made by his directly recruited Supervisor's group. There were no other monies required beyond what has been listed above in this paragraph. There were no other profits accruing to said distributors other than those listed herein above.

d. District Manager—A District Manager purchased products from Symbra'Ette at a 50% discount from suggested resale price.

A District Manager's personal group included his directly sponsored Supervisors' entire groups, and his directly sponsored Senior Keys' entire groups, and his directly sponsored Keys.

A District Manager and his organization initially purchased a dollar volume of $7,500 inventory for one month and had to maintain a monthly purchase volume of $3,000 to remain at this level of the program. One could not "begin" as a District Manager, but, rather, had to "work" his way to this position, by recruiting at least 5 people who reached Senior Key or Supervisor positions in his organization.

A District Manager earned a 15% profit on purchases of his Keys, 10% additional profit on purchases of his Senior Keys, 5% additional profit on his Supervisors' purchases, 3% additional profit on purchases of his directly sponsored District managers' sales groups, and 1% on the purchases of indirectly sponsored District Manager's personal groups. He also earned a cash car allowance of $150 on R.P.V. of $7,500 per month of his personal group. There were no other monies required beyond what has been listed above in this paragraph. There were no other profits accruing to said distributors other than those listed herein above.

e. Regional Manager:

The highest level one could reach with Symbra'Ette was that of a Regional Manager. A Regional Manager bought his products at a 55% discount from Symbra'-Ette.

The personal group of a Regional Manager included his directly sponsored District Managers' entire groups, his directly sponsored Supervisors' entire groups, his directly sponsored Senior Keys' entire groups, and his directly sponsored Keys.

A District Manager's personal group R.P.V. must have reached $25,000 in one month in order to entitle that District Manager to ascend to the position of Regional Manager. Thereafter, a monthly minimum R.P.V. of $12,500 was required to remain at this level of the program.

The Regional Manager earned a 20% profit on purchases of his Keys, a 15% additional profit on his Senior Keys' purchases, a 10% additional profit on his Supervisors' purchases, a 5% additional profit on his directly sponsored District Managers' purchases, 3% on his directly sponsored Regional Managers' personal group purchases. He also earned a $200 cash car allowance on $17,500 monthly personal R.P.V. There were no other monies required beyond what has been listed above in this paragraph. There were no other profits accruing to said distributors other than those listed herein above. (Paragraph 8 of the Stipulation of Facts, dated March 16, 1973.)

ARGUMENTS

A. PUBLIC INTEREST AND ECONOMIC JUSTIFICATION. THERE IS NO EVIDENCE OF RECORD TO SHOW THAT THIS PROCEEDING IS IN THE PUBLIC INTEREST AS REQUIRED UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT.

To satisfy the statutory requirements, the public interest must be specific and substantial with the purpose of the proceeding being the protection of the public. In the matter of the F.T.C. Docket 8875, *Certified Building Products*, the complaint was dismissed on the ground inter alia that a preponderance of the public witnesses

conceded that they were not deceived but rather thought they contracted for and received a good deal.

The Commission's only witness testified that he initially purchased Symbra'Ette merchandise and goods for $700 (Tr. p. 76, lines 19-21) and that during the first year his wife's profit on the sale of Symbra'Ette merchandise and goods to ultimate consumers was about $1,500 (Tr. p. 73, lines 1-4). For a fact, he did so well he reordered Symbra'Ette merchandise in excess of 50 times (Tr. p. 90, line 25 to p. 91, line 13). An inference cannot be drawn from these facts that the Commission's witness was damaged or injured by the Symbra'Ette merchandising program.

The petitioners' witness (herein referred to as "Sanford"), a lawyer and a Federal Government employee for over ten years, testified that he purchased Symbra'-Ette products with an initial order of $500. (Tr. p. 134, lines 17-23.) Retail sales to ultimate consumers by the wife of Mr. Sanford ranged from $6,000 to $12,000 annually. (Tr. p. 135, lines 7-24.) Presently, Mr. Sanford and his wife have an annual profit of $20,000 from their Symbra'Ette distributorship. (Tr. p. 148, lines 10-24.)

Exhibits RX-94 through RX-115 are typical commission statements of Symbra'Ette distributors and graphs showing permanent current records of distributors. From these exhibits and from the above testimony, one may conclude that the Symbra'Ette distributors profited from the Symbra'Ette program and, in fact, were not injured, damaged or deceived.

It is well to review the testimony of Dr. Kirk Wassenaar, Associate Professor of Marketing at the California

State University at San Jose. Dr. Wassenaar expressed the opinion that the Symbra'Ette program offered a unique opportunity to many members of our society who would like to engage in a small business. These persons would not have this opportunity were it not for the Symbra'Ette program because such persons do not have sufficient resources or experience. (Tr. p. 238, lines 1-8; Tr. p. 244, line 16 to p. 245, line 11.)

Additionally, it is well to consider Dr. Wassenaar's observations as to the impact of the Symbra'Ette program from a marketing point of view. Dr. Wassenaar testified that the Symbra'Ette program is more aggressive and is more result-performance oriented than traditional marketing plans. It is a less expensive way of achieving faster distribution of the products. A company can be established faster for less money and less manpower. (Tr. p. 260, line 3 to p. 261, line 4; Tr. p. 288, line 22 to p. 290, line 11.)

The Commission, in its Decision on page 25, held that the present proceeding is in the public's interest because the evidence reveals that Symbra'Ette's practices have the potential and capacity to deceive, and thereby they possess the capacity and potential to cause the loss of not inconsiderable sums of money by individuals who may rely on them to their detriment. Yet, there is no evidence of record of probative value to show the potential and capacity to deceive or to show actual damage or injury.

In the 7th Circuit case, *S. Buchsbaum & Co. v. F.T.C.* (1947) 160 F.2d 121, the Court set aside the order of the Commission on deceptive practices and stated:

> We find in this record no evidence of any injury to any dissatisfied customer, indeed, there are no dissatisfied customers as far as this record discloses. . . . However, even though there be no proof of actual deception required, there must be a showing that the acts and practices sought to be proscribed are detrimental to the public interest in order to satisfy the statutory requirement that the proceeding be in the public interest. (15 U.S.C.A. §4516). . . .

B. THERE IS NO SUBSTANTIAL EVIDENCE OF PROBATIVE VALUE TO SUPPORT A FINDING THAT SYMBRA'ETTE'S MARKETING PLAN HAS THE SUBSTANTIAL CAPACITY AND POTENTIAL TO MISLEAD OR DECEIVE.

As above urged, there is no evidence of record of any participant of the Symbra'Ette program actually being misled, deceived, damaged or injured. The evidence is clearly to the contrary. As a consequence thereof, the Commission has relied on the speculative evidence of a theoretical "saturation theory" to show that Symbra'-Ette's marketing plan has a substantial tendency to mislead and to deceive. By virtue of such a "saturation theory", the Commission conjectures that eventually the opportunity to find participants will be exhausted.

The conclusion of the Commission that the Symbra'-Ette program has a substantial tendency to mislead and to deceive is premised on a contention that all participants cannot succeed because a theoretical geometric progression of recruiting is present and that ultimately there must be a restriction of prospective participants and an exhaustion of the number of available participants. These findings are based on speculation, conjec-

ture, surmise and a theoretical analysis. They are not based on any evidence of record of probative value or actual facts.

The theoretical progression theory is defined in Finding of Fact No. 24 of the Initial Decision, which reads as follows:

> 24. By geometric progression, if an organization were to increase monthly using a function of five (5) as a continuous function, or even a function of two (2) continuously (see Dr. Wassenaar, Tr. 279), at the end of a relatively modest period of time, there would be total saturation of the market. In fact, recruits to such an organization theoretically would equal the adult population of the nation as a whole.

The evidence of record clearly establishes that the finding of the Commission is not supported by the actual facts of record of probative value. In truth and in fact, over the period of December 4, 1967 and March 12, 1972, the number of active Symbra'Ette distributors varied between 633 and 3,635. The peak number (3,635) of Symbra'Ette distributors for this period occurred about March 12, 1972. The minimum number (633) of Symbra'-Ette distributors for this period occurred about December 19, 1967. Between May 22, 1969 and June 12, 1969, the number of Symbra'Ette distributors fell from 2,323 to 1,343 (RX-14 through RX-71).

It is noteworthy to observe that Symbra'Ette began its direct sales program in 1963, and over a period of ten years the number of Symbra'Ette distributors at the peak period of March 12, 1972, was 3,635. Consider-

ing the fact that the population of the United States is in excess of 200,000,000 people, the concept of saturation is a fantasy and an absurdity. What may be theoretically possible is ridiculous when viewed in a realistic and practical vein.

The issue presented is what constitutes substantial evidence to support a finding that the Symbra'Ette marketing plan has a substantial tendency and capacity to mislead and to deceive, since the Commission conjectures that eventually the opportunity to find participants will be exhausted. Petitioners submit that substantial evidence must be founded on actual facts of record of probative value rather than speculative evidence of a theoretical analysis of a "saturation theory" which is too remote to be of probative value. The remoteness of the "saturation theory" is manifest when viewed in light of the actual facts of record.

The remote possibility or fanciful theory of private injury is not enough to authorize the Commission to issue an order to cease and desist from a business practice which cannot reasonably be said to constitute an unfair method of competition. *Arnold Stone Co. v. F.T.C.* (5th Cir. 1931) 49 F.2d 1017.

In the case of *J. B. Lippincott Co. v. F.T.C.* (3rd Cir. 1943) 137 F.2d 490, the court held that substantial evidence with which findings of the Federal Trade Commission must be supported, is evidence that affords a substantial basis from which the fact in issue must be reasonably inferred and is more than a scintilla and must do more than create a suspicion of existence of fact to be established.

Circuit Judge Swan, speaking for the Court of Appeals of the Second Circuit (1944) in the case, *Gilb v. Federal Trade Commission* 144 F.2d 580, held that testimony as to a chemical analysis conducted without experience in the use of a preparation and contrary to testimony relating to actual experiences in the use of the preparation was not regarded as substantial evidence to support a finding by the Commission contrary to the actual experiences.

The theoretical progression theory is unsound because the evidence of record establishes that Symbra'Ette gains and loses Symbra'Ette distributors in its merchandising program in the same manner as any business gains and loses distributors from time to time. This factor has not been considered in the saturation theory. Mr. Meredith, a witness called by the Commission, testified in cross-examination as follows on page 78, lines 15-23 of the Transcript of Testimony:

> Q. Today, neither you nor your wife is involved in any way with Symbra'Ette products. Isn't that correct?
>
> A. That's right.
>
> Q. Is it known that other distributors drop out of the Symbra'Ette program and market plan?
>
> A. Yes.
>
> Q. So it's possible then for Symbra'Ette to pick-up distributors and lose distributors. Isn't that correct?
>
> A. Right.

The testimony of Dr. Wassenaar in the Transcript commencing on page 273, line 23, and ending on page 276, line 6, is enlightening on this point, which is as follows:

The Witness: . . . And of course, if you take an abstract model in which you state certain basic assumptions—And let me just give another example. If I have a business of myself today doing a half million dollars a year and I double within one year and I double again, I can prove quickly that within 25 years I will sell more than the total gross national product of the whole country. But obviously, is that extrapolation reasonable, is it in accordance with facts, it remains to be seen. So certainly, if Mr. Steiner wants me to show here that if you take certain of these basic assumptions and you put you here and take the same kind of organization, I think you can prove quite clearly that before long the whole country will be working for you. I find this is an exercise in futility. Because I think this is not at all in correspondence with the facts. . . .

. . . But I think I should point out that this is just a model. It doesn't fit reality. I think it's futile to engage in this at this point. I think just yesterday you showed some beautiful evidence of people, people discontinuing, dropping out and later coming back. I think we should stay realistically. And I think the facts of this case indicate that after 10 years there are only 3,000 distributors. So obviously, the question of saturation, the whole country working for this company, is probably now even at hand.

By Mr. Steiner:

Q. Why is that model a picture of futility?

A. The Key (key) factor not in this model is the fact that there is an opportunity. And in practice, you will find that this happens very often, that distributors go into this for a while and they get tired of it or they find greener pastures or they get pregnant or they get married or they get transferred and they give up this particular kind of program.

> So you have to consider a drop-out rate. Now, certainly, if you have a certain number of local distributors already, any new person joining the organization will recognize a certain amount of saturation is taking place, you are now competing. . . . Like any other business opportunities, this limits the potential market and anyone will see it. So as the company grows, the number of people dropping will probably increase and this thing will balance out to some kind of an equilibrium.

It is submitted that it is incumbent upon the Commission to show by substantial evidence deception, or a substantial capacity or tendency to deceive or mislead, or at least to show by substantial evidence injury or damage to Symbra'Ette distributors. This has not been accomplished by any evidence of record of probative value. (*Korber Hats, Inc. v. F.T.C.*, 311 F.2d 358 (1962 1st Cir.). The burden of proof is on the Commission (Rule 3.34(a) of the Rules of Practice of the Federal Trade Commission). Notwithstanding the expertise of the Commission, its findings must be drawn from substantial evidence of record. (*Gilb v. Federal Trade Commission,* supra).

C. THERE IS NO SUBSTANTIAL EVIDENCE OF RECORD OF PROBATIVE VALUE TO SUPPORT A FINDING THAT SYMBRA'ETTE'S MARKETING PLAN IS "INHERENTLY DECEPTIVE AND INJURIOUS" AS TO VIOLATE SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT.

Unable to prove that Symbra'Ette's marketing program has a substantial capacity and potential to mislead or deceive, the Commission seeks to take umbrage under

a finding that the Symbra'Ette marketing plan is "inherently deceptive and injurious". The Commission in its Decision failed to cite a case holding as a matter of law that a merchandising program can be "inherently deceptive and injurious without any proof of actual damage to anyone.

Holding a merchandising program as being "inherently deceptive and injurious" as a matter of law is a practice which lends itself to abuse and arbitrary and capricious orders. Any finding of inherent deception must be accompanied by a finding of actual injury and damage. In the present action, there is no evidence of record of any actual injury or damage to any participant under the Symbra'Ette marketing program.

To imply such injury and damage without such substantiation resorts to rhetoric instead of evidence and permits decisions to be based on arbitrary and capricious conclusions rather than actual facts. To hold that a merchandising program is inherently deceptive without any actual proof of damages or injury to any participant would be a travesty of justice, because it lends itself to baseless findings and unwarranted orders. If all the critical elements of an alleged violation are only implied, then the need for evidence of probative value becomes a mere sham and mockery.

Such procedure, if permitted, would lend itself to abusive administrative practice for the following reasons:

1. It imputes the wrongful conduct of other selling programs to the marketing program in issue;

2. It causes the prejudging of the marketing program in issue without weighing the merits thereof and without

considering all the facts and circumstances surrounding the same.

In the case *Korber Hats, Inc. v. F.T.C.,* supra, Circuit Judge Hartigan stated:

> Section 5 of the Act makes unlawful unfair methods of competition and unfair deceptive acts or practices in commerce. Congress thus gave the Commission a broad mandate to prevent public deception in the give and take of the market place. *It is clear that what is an unfair method of competition can only be assayed in the environmental and marketing context of the particular practice put in issue.* In *Schecter Poultry Corp. v. United States,* 295 U.S. 495, 532, 533, 44 S. Ct. 837, 844, 79 L. Ed. 1578 (1935), the Court said, '*What are unfair methods of competition are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and what is found to be a specific and substantial public interest.*' (Italics added for emphasis)

The hazards in adopting the legal contentions of the Commission are that they impute to the respondents and others similarly situated the abusive and wrongful conduct of other sales organizations. Holding as a matter of law that merchandising programs are inherently deceptive and inherently misleading results in punitive measures against Symbra'Ette and others similarly situated without fully weighing the facts and circumstances surrounding the marketing program. It begs the questions of harm and injury. Does the law permit punitive measures against Symbra'Ette by concluding its marketing program is inherently misleading and deceptive and the injury is implied therefrom and the damage

is implied therefrom? Where are the constitutional safeguards against the arbitrary and capricious acts of the administrative agency? Can an administrative agency be so endowed that it cannot commit any wrong or abusive act, and, hence, the need for legal principles for passing judgment are no longer required?

The Commission cited the case, *Twentieth Century Co. v. Quilling*, 139 Wisc. 318 (1906) in its discussion of deception and unfairness. In the *Twentieth Century Co.* case, supra, the decision of the Court was predicated on the fact that there was no bona fide sale of a product. Had there been a product sold of commercial value and a bona fide effort was made to sell the product, the Court would have held otherwise. It is urged for reasons hereinabove advanced that Symbra'Ette does have bona fide products, which, in fact, are sold to ultimate consumers. There is, in fact, a consumer demand for the Symbra'Ette products (Exhibits RX-157 through RX-196).

The petitioners are not unmindful of the comments made by the Administrative Law Judge during a prehearing conference, in which he said in part:

> Judge Hanscom. . . . I gather there is a considerable amount of thought that the *Markel (Marco)* case renders count one very questionable. (Tr. page 11, lines 5-21)
>
> I doubt that. The *Markle (Marco)* case involved a punch board where people took chances from one penny to 35 cents, and this, based on the allegations of the complaint, and of course I know absolutely nothing of this case . . . whether they can prove any bit of this or not . . . but based on the allegation of

the complaint, we're dealing here with a sales program in which members of the public invest quite sizable sums of money and it's an entirely different matter. You're not selling a toaster or an electric blanket or something of this sort, or a chance on that. They're selling in effect a distributorship.

And, it's by no means clear to me, far from it, that the *Markle (Marco)* case renders this complaint obsolete in any manner at all. . . .

. . . . But that's all the *Markel (Marco)* case stands for. (Tr. p. 12, lines 18-21)

So under no account, would I ever dismiss count one on the basis of *Markle (Marco)*. And if that's all on your minds, that's my judgment on that. . . .

Mr. Wiseman: I wonder if I might address myself to certain points. I think it falls in the purview of the extent of this hearing today. (Tr. p. 14, lines 18-25)

I am interesting (interested) in reducing the issues to the point that we could present the case . . . instead of a lot of superfluous things, or I might say the guts of the, or what's involved, . . . would the Judge entertain a partial motion of summary judgment so that we can get (rid) [a bid] of those counts that are truly not in contention.

Judge Hanscom: When you say motion for summary judgment, what are you thinking in terms of? (Tr. p. 16, line 25 to p. 17, line 17)

That you would move that I would dismiss certain counts of the Complaint? Is that what you're thinking of?

Mr. Wiseman: Yes.

Judge Hanscom: I'm not going to dismiss count one. Count one alleges sales of basically a lottery. As I understand it, the federal (Federal) government in all 50 states and in the lottery statutes on the

books . . . whether this is a lottery or not, I don't know . . . but it's alledged (alleged) to be, and I would absolutely not dismiss count one.

Mr. Wiseman: Can we assume that to be so even if we presented a fact situation that there is no chance?

Judge Hanscom: Well, now this is another problem. We're pretty far down the road when the Commission issues a complaint. The Commission has issued a complaint alledging (alleging) a violation of law.

Mr. Wiseman: I appreciate you don't want us to argue the merits. If you feel strongly, I will not. (Tr. p. 18, line 17 to p. 19, line 24)

Judge Hanscom: You're welcome to say whatever you want, but I think I've made the decision as I understand it, and what my obligations and responsibilities are, very clear.

All of this . . . I'm pre-judging . . . I don't know whether there's a scrap of proof of this or not. I don't know anything about it. All I know is what I have read in the Complaint and the allegations.

Mr. Wiseman: That's a point I want to make. You say we (you) have not pre-judged the matter, but let's assume that I'm able to bring a motion for summary judgment on count one.

Let's assume further that——

Judge Hanscom: You're welcome to do it if you want to. I can't stop you. If you want to do it, do it. I'll read it and give it very careful consideration, but on the basis of what I know now, reading both your memorandum and that of Complaint Counsel, I'm absolutely not going to dismiss count one.

Mr. Wiseman: I just want to make my point, and that is this:

Let's assume that I could show that there's no dispute of fact as to whether or not the element of chance is present. Let's just assume that fact momentarily. Would you still be in the position that under no circumstances would you dismiss count one, if I can show that factually the elements of the lottery couldn't be proven?

Judge Hanscom: Well, I . . . Of course, what is aserted (asserted) in the motion for summary judgement (judgment) and whatever is filed in the response thereto, I would consider obviously, very carefully, and if the factual allegations appear to be uncontested and the factual allegations don't sustain the allegations of the complaint, then I have to dismiss it I suppose. . . .

Judge Hanscom: . . . *The problem is a little broader too, than this particular case, and that is when an order is accepted by the Commission, it then becomes a sort of precedent,* however strong or not, it does become a sort of precedent, and *this is one of a number of this type of case* . . . well, I don't know if we have any other cases like this or not, but the so-called multi-level sales *schemes* or sales programs are fairly . . . excuse me. I picked up a term somewhere . . . The so-called multi-level sales programs have become apparently rather wide spread. . . . (Italics added for emphasis.) (Tr. p. 24, line 3 to p. 25, line 3)

Mr. Wiseman: Just so the record will be clear, we have never, to the best of my knowledge, caused anyone to invest heavily or substantially. There's been no activity, to the best of my knowledge, in that direction.

I know it's mentioned before, and I don't want my presence here asquiescence, such be the fact——

Judge Hanscom: I understand. I'm making no suggestion.

> I've read these papers and Complaint Counsel says there's 200 of them, and of course *we've read about some of them in the newspapers and so forth,* and I know they all differ, and very possibly yours may bear no relation to any of those, but at any rate when an order is entered that has language, then we are met with a demand for even handing (handed) treatment of everything else, and this type of language is difficult to resist in later orders where it may be quite inappropriate. . . . (Italics added for emphasis.)

Petitioners have the right to have their case judged on its merits. The petitioners' case should not be prejudged in light of the conduct or newspaper accounts of other selling organizations operating open-ended multilevel marketing programs, and to do so is in error and denies the petitioners a fair and impartial hearing. The conduct of others should not be imputed to the Symbra'Ette marketing program. If there have been complaints of deception and injury by others by reason of the practices of other sales organizations, such conduct cannot be imputed to the petitioners. Expertise on the part of the Commission cannot be a substitute for evidence, and petitioners should not be denied a fair and impartial hearing on critical factual matters.

The Commission, in its efforts to establish rule-making policies on a case-by-case basis, has not only disregarded the actual facts of the Symbra'Ette marketing program in reaching its decision, but, also, has disregarded the admonishment of this Court in the case, Marco Sales Company v. FTC (2nd Cir. 1971) 453 F.2d 1. In the just cited *Marco* case, this Court not only held that the law does not permit the Federal Trade Commission to grant to

one person the right to do that which it denies to another similarly situated, but also held that the distinctions articulated by the Commission to justify different treatments must be meaningful in the sense that trade regulating significance is advanced by such distinctions.

D. THE FEDERAL TRADE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY IN SINGLING OUT THE PETITIONERS FOR DISCRIMINATORY TREATMENT, WHILE PERMITTING THE PETITIONERS' DIRECT COMPETITORS TO CONTINUE TO OPERATE UNDER LIKE AND SIMILAR MARKETING PROGRAMS.

Paragraph 10 of the Stipulation of Facts dated March 16, 1973, recites the following:

> 10. There are competitors of Symbra'Ette selling brassieres, girdles, swimwear and lingerie under similar marketing and sales programs. As of March 1, 1973, the Federal Trade Commission has instituted no formal proceedings against any of these competitors on the issues raised by the present complaint.

Exhibits RX-138 through RX-145, RX-201 and RX-202 show that direct competitors of the petitioner sell brassieres and the like under marketing and sales programs similar to the one under appeal in this proceeding.

The Decision by the Commission on page 24 urges that it is absurd to contend that the Order will arbitrarily destroy the petitioner while permitting its direct competitors to prosper under the program prohibited to Symbra'Ette.

The testimony of Dr. Wassenaar on page 288, line 21 to page 289, line 20, of the Transcript did not support the

foregoing when Dr. Wassenaar testified as follows under questioning by the Complaint Counsel:

> Q. If the multi-level feature of the Symbra'Ette sales program were eliminated from the Symbra'Ette marketing program, by the elimination of that feature we still have a marketing program which involves party plans, sales, and fitting by distributors, which involves selling the product, the quality of which—I, personally, have never had an opportunity to use it—but the product of which there has been no dispute as to the quality, if the multi-level feature—meaning the sponsoring feature—were taken away, would it have any adverse effect on Symbra'Ette?
>
> A. Yes, I think it would certainly be disadvantageous to the company, because the program, as you described it, as a more traditional program, would involve a very substantial task upon the company of hiring and training regional managers, hiring and training individual salesladies to go around. There's a high turnover in this kind of an area. So it would be a continuous kind of effort on the part of the company. It would involve substantial expense, because they would have to locate company personnel throughout different parts of the country. I question whether any company of moderate size could accomplish this financially. This is where the financial consequences would be very substantial. It also would take a much longer period of time to develop an organization of that type.

Chairman Lewis A. Engman of the Federal Trade Commission was not unmindful of the problems faced by Symbra'Ette. In an article entitled "The New FTC: Its Role in the 1970's", Chairman Engman observed that the case-by-case adjudication necessarily singles out individ-

ual parties; *no one person must bear the brunt of government action in rule-making.*

The Commission further states in its Decision on page 25 that it proceeded against Holiday Magic, Koscot Interplanetary, Bestline Products, International Saf-T-Trac and Devour Chemical Corp. These companies do not compete with Symbra'Ette. Symbra'Ette is concerned with the companies selling brassieres, girdles and the like under a marketing program in substance the same as the marketing program of Symbra'Ette as shown in Exhibits RX-138 through RX-145, RX-201 and RX-202.

The Commission seeks to impose upon Symbra'Ette the duty of conducting investigations in behalf of the Commission. There are exhibits of record delineating the marketing plans of the direct competitors. The Commission should not be satisfied with the self-serving justification, which admits to its failure of fulfilling its investigatory responsibilities, to wit (Decision, page 25):

> The Commission will, as always, welcome any further information which respondents can provide regarding the allegedly unlawful acts and practices of their competitors, including evidence of their magnitude and duration which might enable the Commission to determine whether further action is necessary or appropriate.

In further justifying its failure to pursue the direct competitors of Symbra'Ette, the Commission draws the distinction that the direct competitors have been in business for a lesser period of time and at a lesser scale than Symbra'Ette. Petitioners do not share the accuracy of these observations. Certainly, they are not based on any

substantial evidence of record. Notwithstanding, petitioners find it difficult to believe that the Commission seriously contends that a marketing plan with allegedly "patent capacity for deception"; which allegedly is "inherently unfair, exploitive and oppressive"; and which allegedly has the "capacity to bilk gullible or uncritical members of the public out of substantial sums of money and out of their time, energy and efforts" is lawful as to those companies in which the magnitude and duration thereof are allegedly less than the scale and duration of Symbra'Ette, and such companies may continue to carry on such an alleged marketing plan without restriction and with complete impunity.

The Commission further justifies its failure to pursue direct competitors of Symbra'Ette on the ground that certain of such direct competitors appear to be fledgling imitators of Symbra'Ette (Decision, page 25). Does the Commission seriously contend that the law need not be enforced against fledgling imitators?

The leading cases as to whether the Federal Trade Commission can conduct itself in an arbitrary and capricious manner do not support the decision by the Commission in this proceeding. In the recent case, *Marco Sales Company v. FTC* (2nd Cir. 1971) 453 F.2d 1, this Court not only held that the law does not permit an agency to grant to one person that right to do that which it denies to another similarly situated, but also held that the distinctions articulated by the Commission to justify different treatments must be meaningful in the sense that trade regulatory significance is advanced by such distinctions. If the Commission's allegations are correct with respect

to open-ended, multi-level marketing programs being abusive and unconscionable, a view not shared by the petitioners, then it must follow that the magnitude and duration of such marketing plans do not abate the alleged wrongful conduct. It is submitted that to rely on such distinctions as magnitude and duration would constitute patently arbitrary and capricious conduct on the part of the Commission. The U. S. Supreme Court case, *FTC v. Universal-Rundle Corporation* (1967) 387 U.S. 245, in effect, supports the above contention of the petitioners. See also *Audivox v. F.T.C.* (1st Cir. 1960) 275 F.2d 685; *Sirbo Holdings, Inc. v. C.I.R.* (2nd Cir. 1973) 476 F.2d 981 at page 987. Mr. Chief Justice Warren, speaking for the U. S. Supreme Court in *FTC v. Universal-Rundle Corporation,* supra, made it clear that the Federal Trade Commission does not have the unbridled power to institute proceedings which will arbitrarily destroy one of many alleged law violators in an industry.

The petitioners raised the foregoing arguments in its Petition for Reconsideration. The Commission's Order Denying Respondents' Motion for Reconsideration urges on page 4 thereof that the Commission is not obligated to proceed simultaneously against all violators in a particular industry, citing *Moog Industries, Inc. v. F.T.C.,* 355 U.S. 411 (1958). From a factual point of view, this contention is not tenable. The complaint of the present action was filed on November 24, 1971. Petitioners believe that as of the present time, the Commission has not filed any formal proceedings against any of Symbra'Ette's direct competitors. It is not a question of whether action must be taken *simultaneously* against all alleged violators,

but rather whether Symbra'Ette under law must be the scapegoat for an entire industry. It is well to bear in mind that three years have passed since the complaint was filed against the petitioners and no proceedings have been instituted by the Commission against the direct competitors of Symbra'Ette.

The Commissioner in the last mentioned Order on page 4 states that its resources are severely limited, and to impose a requirement of simultaneity upon it would render its statutory mission impossible of fulfillment. It is difficult to appreciate that one of the smaller companies and, perhaps, one of the more idealistic marketing plans had to be subjected to the present proceeding, while the larger companies in direct competition with Symbra'Ette with less idealistic marketing plans could stand idly by and continue unscathed and untouched.

The Commission asserts that its alleged abuse of discretion is at best an affirmative defense, and Symbra'Ette must show that this will arbitrarily destroy one of many alleged violators in an industry. The above comments with respect to Dr. Wassenaar's testimony and Mr. Engman's article are worthy of consideration in this light. More significantly, the question posed for consideration is what effect will compliance with Provisions 1 and 2 of the Final Order have on Symbra'Ette when its direct competitors sell the same or similar products under a same or similar marketing plan but without the requirement of compliance with Provisions 1 and 2 of the Final Order?

The Decision of the Commission on pages 16 and 17 acknowledges that the restrictions imposed by Provisions 1 and 2 would result in Symbra'Ette being less competi-

tive with respect to its direct competitors. The Commission on page 16 of the Decision further stated that Provision 1 of the Final Order is designed to ensure that any compensation received by a participant for recruiting activities will be based strictly on retail sales of recruits and not on inventory purchases of recruits. Common sense will dictate that a direct competitor capable of paying profits on sales to other participants as distinguished from paying profits only on sales to ultimate consumers will easily lure away Symbra'Ette's distributors. Provision 2 of the Final Order precludes a distributor for Symbra'Ette from recruiting for one year. Obviously, the ability of a direct competitor to offer a new participant the opportunity of recruiting forthwith and without delay will preclude Symbra'Ette from obtaining new participants under its marketing plan. The net result must be to make Symbra'Ette less competitive than its direct competitors and, of course, ultimately destroy Symbra'Ette.

Since the Commission has singled out Symbra'Ette for discriminatory treatment, then it has violated the constitutional mandate of equal protection of the laws under the Fifth Amendment. (*FTC v. Universal-Rundle Corp.*, supra: *Audivox v. Federal Trade Commission,* supra.) Industry-wide enforcement of the law is a constitutional imperative as a matter of both fairness and equality before the law.

E. PROVISIONS 1 AND 2 OF THE ORDER DO NOT BEAR ANY RELATION WITH THE FACTS OF THIS CASE AND GO BEYOND WHAT IS REASONABLY NECESSARY TO CORRECT THE ALLEGED WRONG AND TO PRESERVE THE RIGHTS OF THE PUBLIC.

Provision 1 of the Final Order provides, in effect, that profits can be paid by Symbra'Ette to a distributor on sales to a participant sponsored by the distributor only upon the sponsored participant making a sale to an ultimate consumer to provide the genesis for the profit. On page 16 of the Decision, the Commission justifies this provision on the ground it would prohibit inventory loading on a new participant.

It is submitted that there is no evidence of record to support any finding of inventory loading on a participant by Symbra'Ette.

Furthermore, Provision 3 of the Final Order makes it mandatory for Symbra'Ette to repurchase the initial inventory of a participant at the price actually paid by the participant upon the written request of the participant within 30 days of the date of purchase of the initial order. Provision 3 of itself would appear to accomplish the avoidance of inventory loading.

The Commission in its Decision on page 16 stated Provision 2 of the Final Order is addressed to the problem of unlimited recruitment. Provision 2, in effect, prohibits third tier participants from sponsoring other participants for a period of one year after joining the Symbra'Ette program. There is no substantial evidence of record of probative value to support a finding of a problem of unlimited recruitment on the part of Symbra'Ette. The actual facts of record are that after ten years of doing

business under its marketing program, Symbra'Ette has never had more than 4,000 participants at any given time. The Commission has relied on a theoretical analysis of a "saturation theory" to buttress its decision, which is speculative evidence and is not substantial evidence of probative value. Inferences drawn from speculative evidence must give way to the actual facts of record of probative value. Notwithstanding the expertise of the Commission, its findings must be drawn from substantial evidence of record. (*Gilb v. F.T.C.*, supra)

To justify Provision 2, the Commission in its Decision on page 16 states even if the unlimited recruitment is eliminated by Provision 1 of the Final Order and a distributor's profits in the system are related solely to the retail sales of successive generations of participants, the possibility of deception remains because the participant can be induced to buy inventory on the mistaken assumption that the retailing functions can be delegated to later generations of participants. The seeking of lower tier distributors or dealers is a conventional and acceptable mercantile practice. What is the premise for the alleged deception? Is it the exhaustion of available participants because of a saturation of participants? As above noted, the "saturation theory" has no probative value and is too remote to be a basis for a finding of fact. Is it the alleged element of a chance as in a lottery? Yet, the Decision of the Commission on pages 17-21 rejected the lottery concept and particularly the elements of chance thereof.

More significantly, the mandate of repurchase of the initial inventory under Provision 3 and the payment of

profits solely on retail sales under Provision 1 would be of themselves a deterrent against unlimited recruitment.

The issues submitted are whether Provisions 1 and 2 of the Final Order bear any relation with the facts and circumstances of record in this proceeding and whether or not Provisions 1 and 2 of the Final Order are reasonably required or necessary.

It appears to the petitioners that the Commission, in its efforts to establish rule-making policies on a case-by-case basis for open-ended, multi-level selling programs, has totally disregarded the facts of the present proceding.

It was held in the case, *Swanee Paper Corp v. F.T.C.* (2nd Cir. 1961) 291 F.2d 833 that the Final Order must bear a relation in scope to the facts of record.

In the case, *FTC v. Milling Co.* (1933) 288 U.S. 212, the Supreme Court held that an order should go no further than is reasonably necessary to correct the alleged wrong and preserve the rights of the public. When measures employed achieve the results desired by the Commission, there is no need to employ more drastic means.

In view of the foregoing, it is submitted that Provisions 1 and 2 of the Final Order do not bear any relation with the facts of the present proceeding and are not reasonably required and are not reasonably necesssary.

Provision 2 of the Final Order creates the problem of discrimination among third tier participants. It establishes one year as a time period for which new third tier participants must wait in order to recruit others. Thus, Provision 2 of the Final Order arbitrarily discriminates between new and old third tier participants and those third tier participants who have been participants for at

least one year and those third tier participants who have been participants for less than one year.

The impact of Provision 2 of the Final Order should be considered from the point of view of the third tier participant. After all, it is the purpose of the present proceeding to protect the third tier participant. It would appear that in the mind of the newly recruited third tier participant is the pressing observation of discrimination among third tier participants. Specifically, the new third tier participant suffers the consequence of having to wait one year before the complete benefit of a marketing program can be enjoyed.

CONCLUSION

For the reasons above submitted, it is respectfully requested that the Order of the Federal Trade Commission be set aside and the complaint be dismissed as to the petitioners. Alternatively, that said Final Order be stayed until Symbra'Ette's direct competitors be ordered to comply with provisions similar to Provisions 1 and 2 of the Final Order of the Federal Trade Commission or the Final Order be modified by deleting Provisions 1 and 2 therefrom or the case be remanded back to the Commission for further proceedings.

Dated, San Jose, California,
December 20, 1974.

Respectfully submitted,

Jack M. Wiseman
Clifton H. Stanage

Attorneys for Petitioners.

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of San Francisco; I am over the age of eighteen years and not a party to the within action; my business address is: 562 Mission Street, San Francisco, California.

On December 31, 1974, I served the within

Petitioners' Brief, "Ger-Ro-Mar, Inc. vs. Federal Trade Commission", in the United States Court of Appeals for the Second Circuit, No. 74-2343;

on the attorneys in said action, by placing two copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at San Francisco, California, addressed as follows:

Mr. Gerald Harwod, General Counsel
Mr. W. Baldwin Ogden, Asst. General Counsel
Federal Trade Commission
Sixth & Pennsylvania Avenues, N.W.
Washington, D.C. 20580

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on December 31, 1974, at San Francisco, California.

M. J. Connolly